TD 1998/D16 - Income tax: non-profit societies, associations or clubs located outside Australia that promote cultural activities such as the arts: is income derived by these organisations subject to Australian income tax if they provide performances at Australian cultural festivals and events?

This document has been finalised by TD 1999/7.

Australian Taxation Office

Taxation Determination TD 98/D16

Draft Taxation Determination

Income tax: non-profit societies, associations or clubs located outside Australia that promote cultural activities such as the arts: is income derived by these organisations subject to Australian income tax if they provide performances at Australian cultural festivals and events?

1. Yes, in accordance with subsection 6-5(3) of the *Income Tax Assessment Act 1997* (the Act), unless:

(i) one of Australia's double tax agreements (DTAs), which form part of the *International Tax Agreements Act 1953*, operates to exempt the income; or

(ii) the organisation is a prescribed organisation for the purposes of sections 50-45 and 50-70 of the Act.

2. Australia's more recent DTAs are based on the OECD Model Tax Convention on Income and Capital. Under these DTAs, where income in respect of the personal activities of visiting entertainers (such as theatrical artistes, dancers and musicians) accrues not to the entertainers themselves but to another person (including a non-profit company or other entity), that other person may be subject to Australian tax on the income. In these cases, the *Entertainers Article* overrides the *Business Profits Article* and that other person is subject to Australian tax, regardless of whether the income is attributable to a permanent establishment in Australia. However, the existence of a provision in a DTA dealing specifically with cultural exchange programs, or visits by entertainers that are substantially funded by the public funds of their home country, could operate to exempt the income from Australian tax - see, for example, Article 17(3) of the Chinese Agreement and Article 17(3) of the Spanish Agreement, respectively.

3. The *Entertainers Article* of some of Australia's older DTAs does not contain exemption provisions of that type. However, Australia's taxing right over income, in respect of the activities of a visiting entertainer that accrues to another person, may be conditional on whether the entertainer either directly or indirectly participates in the profits of the other person or controls the other person - see, for example, Article 17(2) of the USA Convention and Article 16(2) of the German Agreement, respectively.

4. Where such conditions are not met, it becomes necessary to consider whether Australia has a taxing right over the income of the organisation under the *Business Profits Article* of the relevant DTA. For example, under the terms of the USA Convention, where Article 17(2) does not give Australia a taxing right over the profits derived by an American dance company which visits

Australia to perform at an international festival, Australian tax would only be payable on those profits if the company had a permanent establishment (as defined in the Convention) in Australia.

5. As indicated above, foreign non-profit cultural organisations, which are not relieved from Australian tax under a DTA or which are located in countries with whom Australia has not concluded a DTA, remain subject to Australian tax on their relevant Australian sourced income. However, the incidence of Australian tax would often be likely to be small or even non-existent because of the size of tax deductions available in respect of the expenses associated with the tour.

6. Any organisations that are concerned about the Australian taxation position of any proposed performances in Australia by overseas cultural organisations should contact their local Taxation Office to ascertain, on behalf of those participants, whether they would have a potential Australian income tax liability.

7. If an overseas cultural organisation is likely to be subject to Australian tax, it may still be possible for it to obtain an exemption if Parliament decides to grant an exemption by prescribing it in the Income Tax Assessment Regulations. Sections 50-45 and 50-70 of the Act specifically provide for an exemption to be prescribed by regulation as long as the organisation is exempt from income tax in the country in which it is resident. Any requests for an exemption under the Regulations may be made to the ATO, which will forward them to Government for its decision.

Your comments

8. If you wish to comment on this draft Determination, please send your comments by 20 November 1998 to:

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Commissioner of Taxation
21 October 1998

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